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IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM L. FISHER, individually and as Administrator of the Estate of Therese de L. Fisher, Deceased,
Petitioner,

-vs-

OMAHA INDEMNITY COMPANY, a foreign insurer,
Respondent.

No. 80-1044

RESPONSE TO PETITION FOR EXTRAORDINARY WRIT

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RESPONSE TO PETITION FOR EXTRAORDINARY WRIT

Respondent, Omaha Indemnity Company, respectfully prays that Petitioner's Petition for Extraordinary Writ be denied.

QUESTION PRESENTED

Did the Federal Court have jurisdiction to hear this action?

STATEMENT OF THE CASE

Respondent issued to Petitioner its Family Automobile Policy providing (PART I) coverage, as applied for by Petitioner, for public liability but not collision insurance, which would have been covered under PART III thereof.

> The policy contained the following exclusion under PART I (i):
>
> "This policy does not apply under Part I:
>
> "(i) to injury to or destruction of (1) property owned or transported by the insured or (2) property rented to or in charge of the insured . . ."

Additionally, the policy also agreed to pay medical expenses up to a maximum amount of $5,000.00 in PART II C as follows: "To pay all reasonable expenses incurred within one year from the date of the accident for necessary medical, surgical, x-ray and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services." This benefit applied to the named insured and each relative sustaining bodily injury while occupying an owned automobile or a non-owned automobile operated with the consent of the owner.

On March 20, 1973, Therese de L. Fisher, the daughter of the Petitioner insured, William L. Fisher, borrowed an

automobile from one Richard Kolar, apparently an automobile dealer, and as a result of her negligence damaged the automobile by overturning it. Richard Kolar sued her and obtained a judgment in the amount of $1,635.00 against her for the damage to the automobile.

Petitioner submitted various medical bills to Respondent for the twelve-month period ending March 20, 1974, for medical expenses incurred by Therese de L. Fisher, totaling $1,172.65, all of which it paid. It refused to pay any medical expenses incurred after March 20, 1974 because of the twelve-month medical limitation period regarding medical expenses quoted above.

Respondent refused to pay the judgment obtained by Richard Kolar or any other sums because it maintains that the provisions of the policy quoted above exlude coverage respecting the use by Therese de L. Fisher of the Kolar automobile.

Petitioner instituted garnishment proceedings against Respondent in the Michigan District Court, which proceedings were quashed by the Court because there was no basis for the issuance of a writ of garnishment. Thereafter, Petitioner instituted the instant action in the Oakland County Circuit Court for the State of Michigan, which was removed by Respondent to the Federal District Court on the basis of diversity of citizenship. The Federal District Court granted summary judgment in favor of Respondent. This judgment was affirmed by the Federal Court of Appeals (Appendix A).

Petitioner never challenged the removal of the action by Respondent until after the Court of Appeals affirmed the judgment of the Federal District Court. His subsequent petition for rehearing based on jurisdictional grounds was denied by the Court of Appeals (Appendix B).

ARGUMENT

THE FEDERAL COURT HAD JURISDICTION TO HEAR THE INSTANT ACTION.

Petitioner's petition is predicated on the theory that under 28 U.S.C. Sec. 1332(c) his initial action in the state court was a "direct action against the insurer of a policy or contract of liability insurance . . . to which action the insured is not joined as a party defendant", and that consequently by virtue of that section Respondent is made a statutory citizen of the State of Michigan.

A review of the fact situation in the instant case shows very clearly that it does not come within the intendment of the above statutory section. That section was, as the Court of Appeals stated in its order denying rehearing (Appendix B), "clearly designed by Congress to remove from diversity jurisdiction those lawsuits brought by a third party directly against the insurance company where diversity would not otherwise lie against the insured." The instant action does not come within the meaning of that section. It is an action by the insured against his own insurance company, a foreign insurer whose principal office and principal place of business is in the State of Nebraska.

That 28 U.S.C. Sec. 1332(c) is not intended to apply to a fact situation where, as here, an insured is suing his own insurer, not somebody else's insurer, is borne out by the case of *Irvin* v. *Allstate Insurance Co.*, 437 F. Supp. 575 (1977), also cited by the Court of Appeals in its order denying rehearing, where the Court sets forth the rationale behind the adoption by Congress of that particular section (pp. 576-577):

> "The proviso of the above section was added in 1964. The legislative history of the 1964 amendment to Sec. 1332(c) discussed in *White* v. *United States Fidelity and Guaranty Co.*, 356 F.2d 746 (1. Cir. 1966), makes it clear that the words 'direct action' were used to refer to statutes such as those in

Louisiana and Wisconsin which allow a party injured by the negligence of an insured to pursue his right of action against the insurer alone. Therefore, the primary purpose of Sec. 1332(c) would seem to have been to remedy the overcrowding of the dockets of the federal courts in Louisiana and Wisconsin caused by the fact that citizens of those states injured by the negligence of their fellow citizens covered by liability insurance policies by foreign insurers could litigate or be compelled by removal to litigate in the federal courts claims that ordinarily would have been litigated in the local state courts. *Lassiter* v. *State Farm Mutual Automobile Insurance Co.*, 371 F.Supp. 1221 (E.D. Ark. 1974).

"(3) Courts which have construed Sec. 1332(c) have uniformly held that Congress intended the word 'direct' to limit the word 'action' so that its impact is narrowed to those situations in which an injured party is permitted to sue, directly and without joinder of the tortfeasor, the tortfeasor's liability insurer without first obtaining a judgment against the tortfeasor himself. *Lank* v. *Federal Insurance Co.*, 309 F.Supp. 349 (D. Del. 1970); see *White* v. *United States Fidelity and Guaranty Co., supra; Walker* v. *Firemans Fund Insurance Co.*, 260 F.Supp. 95 (D. Mont. 1966); *Carvin* v. *Standard Accident Insurance Co.*, 253 F.Supp. 232 (E.D. Tenn. 1966), *aff'd*, 395 F.2d 326 (6 Cir. 1968). Accordingly, actions by an insured against his own insurer under the uninsured motorist provisions of the policy have been held not to constitute direct action within the proviso of Sec. 1332(c). *Adams* v. *State Farm Mutual Automobile Insurance Co.*, 313 F.Supp. 1349 (N.D. Miss. 1970); *Bishop* v. *Allstate Insurance Co.*, 313 F.Supp. 875 (W.D. Ark. 1970); *Inman* v. *MFA Mutual Insurance Co.*, 264 F.Supp. 727 (E.D. Ark. 1967)."

From the foregoing, it is clear that the Federal District Court had subject matter jurisdiction in this diversity case.

CONCLUSION

WHEREFORE, Respondent prays that Petitioner's Petition for Extraordinary Writ be denied.

Respectfully submitted,

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DATED: December 31, 1980

APPENDIX A

No. 79-1046

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM L. FISHER, individually and as administrator of the Estate of Therese de L. Fisher, deceased,
Plaintiff-Appellant

v.

OMAHA INDEMNITY COMPANY,
Defendant-Appellee

Before: ENGEL and KEITH, Circuit Judges and BALLANTINE, District Judge*

This matter is on appeal from a summary judgment entered in favor of the defendant in the plaintiff's action, originally filed in the Oakland County, Michigan, Circuit Court and removed by the defendant insurance company to the United States District Court for the Eastern District of Michigan. Plaintiff's complaint sought to recover from Omaha Indemnity Company certain sums which individual plaintiff William L. Fisher had incurred individually and as administrator of the estate of his deceased daughter Therese de L. Fisher. The monies sought included the amount of a judgment entered against his daughter for liability in an automobile accident which occurred on March 20, 1973, the cost of defense of that litigation, medical expenses incurred on account of her injuries in that accident, and punitive damages claimed because of the insurance company's failure to honor its obligations under the contract of insurance.

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* Hon. Thomas A. Ballantine, Judge, United States District Court for the Western District of Kentucky, sitting by designation.

A review of the entire record convinces us, as it did the district judge, that the insurance policy as a matter of Michigan law did not cover the damages to the vehicle in question nor require the insurer to defend the claims for damages not covered by the policy.

We further note that the insurer, prior to the institution of the litigation, had fully honored its obligation to pay for medical expenses which were incurred on behalf of the decedent for the twelve-month period ending March 20, 1974, and it had no obligation to honor any expenses beyond those already paid for in that one-year period. While Michigan law requires the policy of insurance to be construed most favorably to the insured, there were, contrary to the assertion of the appellants, no ambiguities in the policy which would affect the construction of its plain language. In addition, because the insurer's denial of further coverage was proper under the terms of the policy, there could be no claim for punitive damages. Accordingly,

IT IS ORDERED that the judgment of the district court be and it is hereby affirmed.

Entered by the Order of the Court,

JOHN P. HEHMAN, *Clerk*

APPENDIX B

ORDER

Before: ENGEL and KEITH, Circuit Judges and BALLANTINE, District Judge*

Plaintiff's petition for rehearing en banc has been referred by the Chief Judge to the original hearing panel, no judge in active service of the court having requested a vote for rehearing en banc.

In his petition, the plaintiff asserts for the first time that the district court was without subject matter jurisdiction in this diversity case because it is a "direct action against the insurer of a policy or contract of liability insurance . . . to which action the insured is not joined as a party defendant." Therefore, in such case the defendant insurance company is made a statutory citizen of Michigan by virtue of 28 U.S.C. §1332(c). Assuming without deciding that the issue so tardily raised in these proceedings is properly before the court, it nonetheless appears that it is entirely without merit. 28 U.S.C. §1332(c) was clearly designed by Congress to remove from diversity jurisdiction those law suits brought by a third party directly against the insurance company where diversity would not otherwise lie against the insured.

In his petition for rehearing, plaintiff has cited no authority for his position in addition to the statute because there is none. Where the issue has arisen, the cited statute has consistently been held not to bar a diversity action between the insured under an insurance policy and his insurer. *White* v. *United States Fidelity & Guaranty Co.*, 356 F.2d 746 (1st Cir. 1966); *Irvin* v. *Allstate Insurance Co.*, 436 F.Supp. 575 (W.D. Okl. 1977); *Adams* v. *State Farm Mutual Automobile Ins. Co.*, 313 F. Supp. 1349 (N.D. Miss.

* Hon. Thomas A. Ballantine, Judge, United States District Court for the Western District of Kentucky, sitting by designation.

1970); *Inman* v. *MFA Mutual Insurance Co.*, 264 F. Supp. 727 (E.D. Ark. 1967). Accordingly,

IT IS ORDERED that the petition for rehearing is denied.

Entered by the Order of the Court,

JOHN P. HEHMAN, *Clerk*